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RESTRUCTURING UNDER THE BUSINESS CORPORATIONS ACT

In the recent case of *Re Masonite International Inc.*, the Ontario Superior Court approved a plan of arrangement under the *Canada Business Corporations Act* (“CBCA”), notwithstanding that certain insolvent entities were involved. This was a short but complex cross-border restructuring which commenced and was principally completed prior to the recent Canadian insolvency legislation amendments coming into force.

On March 16, 2009, an Initial Order under the *Companies’ Creditors Arrangement Act* (“CCAA”) was granted to the Masonite group of companies (collectively, “Masonite”). In this Order a cross-border protocol was approved to facilitate coordination with the contemporaneous Chapter 11 proceedings ongoing in the United States. Masonite continued business as usual for the duration of the proceedings, at the conclusion of which it sought, under s. 18.6 of the CCAA, recognition of an Order of the U.S. Bankruptcy Court in Delaware approving a restructuring plan (the “Restructuring Plan”).

The Restructuring Plan involved reducing Masonite’s debt by roughly \$2.0 billion through cancellation of certain secured claims and notes and replacement with \$300.0 million in new debt and additional equity. The Restructuring Plan would leave certain other secured and unsecured claims uncompromised.

As the Court stated, the “essence” of the reorganization required the CCAA stay of proceedings to be lifted to permit a new company (“NewCo”) to apply for approval of a Plan of Arrangement under the CBCA. This Plan of Arrangement would see the shares of several of the Masonite companies amalgamated, with the shares of the amalgamated entity to be purchased by NewCo. The shares of NewCo would in turn represent the equity exchanged for the debt under the Restructuring Plan.

The “creative portion of this restructuring”, the Court noted, was the commencement of the application under the CBCA. There was limited, but sufficient, authority on this issue for the Court to confidently determine that the structuring of the arrangement in this manner was appropriate. As the Court stated:

17 Section 192(3) of the CBCA provides:

Where it is not practicable for a corporation that is not insolvent to effect a fundamental change in the nature of an arrangement under any other provision of this Act, the corporation may apply to a court for an order approving an arrangement proposed by the corporation.

18 The plan falls within the definition of “arrangement” within s. 192(1) of the CBCA, which among other things permits amalgamation of two or more corporations, transfer of property of a corporation in exchange for securities.

19 Compromise of debt and securities in *Savage v. Amoco Acquisition Co.* in the context of a takeover bid was held to be within the section, as it involved an exchange of securities.

20 Like the CCAA itself, which has been held to be broadly interpreted, the CBCA section on arrangements has been held to be capable of “flexibility incorporating whatever tools and mechanisms of corporate law the ingenuity of their creators bring to the particular problem at hand”.

21 All of the corporations involved in the Canadian Plan are incorporated or continued under the CBCA. The sole applicant 715, being a newly capitalized entity, is not insolvent. The transaction is certainly not a sham and the form is appropriate for the intended purpose, even though one or more of the companies at the crux of the arrangement is insolvent.

The Court cited authority for the proposition that where there is more than one applicant, only one need meet the s. 192(3) test. Additionally, the Court noted that in the restructuring of Stelco Inc., the CCAA stay was lifted to allow an application for approval of a CBCA plan to proceed.

The primary factors for the Court's approval of the CBCA Plan were that it was fair and reasonable, and that it was not practicable to proceed in any other manner. The Court granted the application, and commended the use of creative statutory remedies.

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